PERFORMANCE OF THE SYSTEM IV: IMPLEMENTATION

Revenge of the *Push-Me, Pull-You*: The Implementation Process Under the WTO Dispute Settlement Understanding

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I. Synopsis

The 1967 film *Doctor Dolittle*[1] featured a genetically-peculiar llama with a head on each end, aptly named a *Push-Me, Pull-You*. The concept of the animal was that if one person pulled it on one end while another pushed on the far end, the beast would move along in the desired direction. If, on the other hand, persons on each end simultaneously pushed or simultaneously pulled, the animal would not go anywhere and would very likely spit, as llamas are wont to do, on both individuals involved.

The implementation process under the Dispute Settlement Understanding

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1. The film, which starred Rex Harrison, Samantha Eggar, and Anthony Newley, and received nine Academy Award nominations, including Best Picture, Best Original Musical Score, and Best Song ("Talk to the Animals," which won), was based on Hugh Lofting's stories from the 1920s.

(DSU)[2] of the World Trade Organization (WTO) bears a strong resemblance in its operation (without the spitting) to the *Push-Me, Pull-You*. Increasingly, winning complainants and losing defendants are simultaneously pulling or pushing on the precise wording of a panel and/or Appellate Body report in an attempt to define precisely the nature and extent of a losing defendant's obligation.

In this regard, we conclude that the implementation provisions in articles 21 and 22 of the DSU face two principal challenges: speed and thoroughness of implementation by losing parties. With regard to *speed* of implementation, the process appears to be working relatively smoothly, albeit with more reliance on the fifteen-month guidepost at article 21.4 than might be optimal.

By contrast, with regard to *thoroughness*, the process faces substantial challenges in the ongoing implementation of three key decisions: *Canada—Periodicals, EU—Bananas* and *EU—Beef Hormones*. In each of these cases, the losing party has—to the consternation of the winning parties—issued a combination of vague commitments to implement and statements of intent to replace the measures found to be GATT-inconsistent with other measures of comparable protective value. In each of these cases, substantial differences exist between the views of the complaining and defending Members with respect to the defending Member's implementation obligations. These differences are already raising significant challenges for the DSU implementation process. Such challenges are likely to continue to arise, particularly in politically-important cases and/or ones involving complicated issues of fact and/or law.

We recommend that one key way for the system to manage implementation of such decisions more effectively is through early use of the ninety-day panel review process provided for at article 21.5 (for example, starting three to six months after adoption of the panel or Appellate Body report). However, while article 21.5 provides a useful mechanism, it is unlikely in itself to provide a solution to shortcomings that are becoming apparent in the DSU's implementation provisions. These shortcomings reflect the fundamentally *political* nature of the implementation process—in contrast to the earlier stages of the dispute resolution process under the DSU, which are at least somewhat more insulated from political pressures. At the same time, the types of cases that appear to be presenting the greatest challenges for the implementation processes under the DSU are the same types of cases that are challenging the ability of the system at other stages: namely, cases that are factually and/or legally more complicated than the typical GATT complaint, as well as more politically-prominent cases.

In Section II, below, we summarize the DSU's provisions on implementation. In Section III, we evaluate how the DSU provisions have been used or applied

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1226 (1994) [hereinafter DSU].

in each of the eight cases for which the implementation process has, at a minimum, begun. In Section IV, we offer some preliminary conclusions.

II. Summary of DSU Implementation and Compensation/ Suspension Provisions

A. Implementation Process Under Articles 21 and 22

Article 21 of the DSU is entitled "Surveillance of Implementation of Recommendations and Rulings" and sets out the WTO's process for the implementation of panel and Appellate Body decisions. If a losing party does not fully implement a decision, article 22 provides for "Compensation and the Suspension of Concessions."

The first paragraph of article 21 contains an admonition to all WTO Members to comply promptly with recommendations or rulings of the Dispute Settlement Body (DSB).[3] Article 21 also contains three paragraphs devoted to disputes involving developing country Members: (1) article 21.2 provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement;" (2) article 21.7 similarly directs the DSB to consider, in cases brought by developing country Members, "what further action it might take which would be appropriate to the circumstances;" and (3) article 21.8 further directs the DSB, in cases brought by developing country Members, to "take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned." These provisions have not been applied to date, and it is unclear what, if any, precise impact they will have on implementation of decisions in cases involving developing country Members.

B. Three-Phase Implementation Process Under the DSU

Article 21, paragraphs 3, 4, 5 and 6, contains the key operational directions concerning implementation of panel and Appellate Body decisions. Under the procedures established at article 21, there are essentially three phases to implementation of a panel or Appellate Body decision.

1. *Phase 1: Acceptance of Plan for Implementation*

If a panel or Appellate Body report finds that a WTO Member has acted in a manner that is inconsistent with its WTO obligations, or nullifies or impairs benefits within the meaning of article XXIII:1(b) of the GATT 1994,[4] article

3. Article 21.1 provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

21.3 requires that the Member notify the DSB of its plan for implementing the report at a DSB meeting held within thirty days after the report is adopted.[5] Article 21.3 further provides that "[*i*]*f it is impracticable to comply immediately* with the recommendations and rulings, the Member concerned shall have a *reasonable period of time* in which to do so."[6]

Article 21.3 provides three alternative methods for determining a "reasonable period of time." The first option, set out at article 21.3(a), is "the period of time *proposed by the Member concerned* provided that such period is approved by the DSB."[7] In other words, the time period must be acceptable to the winning complainant and all the other members of the DSB. Second, "in the absence of such approval,"[8] article 21.3(b) provides that a "reasonable period of time" is "a period of time *agreed by the parties to the dispute* within forty-five days after the date of adoption of the [report]."[9] Finally, "in the absence of such agreement,"[10] article 21.3(c) provides that "a reasonable period of time" will be "[*d*]*etermined through binding arbitration* within ninety days after the date of adoption of the [report]."[11] Article 21.3(c) further provides that:

> [a] guideline for the arbitrator should be that the reasonable period of time . . . should not exceed fifteen months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.[12]

It is notable that except in non-violation cases,[13] the mandate of the arbitrator is limited to determining the period of time for implementation. In non-violation cases, article 26.1(c) provides that an arbitrator under article 21.3(c) may, "[u]pon the request of either party, . . . include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment. . . ."

Article 26.1(c) also stipulates that "such suggestions shall not be binding upon the parties to the dispute."

2. *Phase 2: Monitoring Implementation*

During the fifteen-month implementation period, the DSU provides the winning complainant two principal mechanisms to compel a losing Member's compliance

5. Footnote 11 to article 21.3 provides that if no meeting of the DSB has been "scheduled during this period, such a meeting of the DSB shall be held for this purpose."
6. GATT, *supra* note 4, art. 21.3 (emphasis added).
7. *Id.* art. 21.3(a) (emphasis added).
8. DSU, *supra* note 2, art. 21.3(a).
9. GATT, *supra* note 4, art. 21.3(b) (emphasis added).
10. DSU, *supra* note 2, art. 21.3(b).
11. GATT, *supra* note 4, art. 21.3(c) (emphasis added).
12. *Id.* (footnote omitted). Footnote 13 to article 21.3(c) provides that "[t]he expression 'arbitrator' shall be interpreted as referring either to an individual or a group."
13. "Non-violation cases" refer to those brought under article XXIII:1(b), in which the complaining party alleges that a measure applied by the defending party, while not in violation of a provision of GATT, nonetheless nullifies or impairs benefits owed to the complaining party, or impedes the attainment of an objective of the GATT.

with a panel decision. Complainants can request review by the original panel or active monitoring of the losing country's implementation of the decision. As we discuss below at section C, countries have, in fact, used these mechanisms in the context of the nine disputes in which losing defendants were required to implement panel decisions.

a. Dispute settlement

Under article 21.5, a winning complainant can, at any point following the adoption of a panel or Appellate Body decision, request a ninety-day review by a panel (the DSU specifies that the *original* panel should conduct the review "wherever possible")[14] where it disagrees with the losing party "[a]s to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. . . ." In other words, if the losing party at any point during the implementation process takes an action that it claims is in compliance with any element of the panel or Appellate Body decision, and the winning complainant disagrees, the complainant can request that the panel be reconstituted to decide the issue.

b. DSB surveillance

Article 21.6 of the DSU further provides that "[t]he DSB shall keep under surveillance the implementation of adopted recommendations or rulings." This provision ensures ongoing oversight by the DSB over panel and Appellate Body decisions that are being implemented.

If passive oversight by the DSB is not perceived as adequate by a winning complainant, article 21.6 provides express authority for *any* WTO Member, including the winning party, to raise "[t]he issue of implementation of the recommendations or rulings at any time following their adoption." Further, paragraph 6 provides that "[u]nless the DSB decides otherwise, the issue of implementation shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time . . . and shall remain on the DSB's agenda until the issue is resolved." In this context, the losing defendant is required to submit "[a] status report in writing of its progress in the implementation of the recommendations or rulings" ten days before each such meeting of the DSB.

3. *Phase 3: Retaliation/Compensation*

a. Summary

Article 22.2 provides that if the losing party does not implement the panel's recommendations or rulings within a reasonable period of time, the winning complainant may seek compensation. If the winning party requests such compensation, the losing party is required to enter into consultations "with a view to

14. DSU, *supra* note 2, art. 21.5.

developing mutually acceptable compensation." If no acceptable compensation has been agreed within twenty days after the expiration of the reasonable period of time, the complainant or, in fact, "[*a*]*ny* party having invoked the dispute settlement procedures, may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."[15]

Article 22.6 provides that within thirty days of the end of the "reasonable period," the DSB is *required* to authorize suspension of concessions or other obligations if the parties have not agreed to compensation. There are only two exceptions to this mandatory DSB-authorized suspension of concessions or obligations. First, the DSB may decide by consensus to reject the request (unlikely, of course, since the consensus would have to include the party requesting suspension). The second exception occurs when the defending country objects to the level of suspension proposed or asserts that the "principles and procedures" established at article 22.3 have not been followed in determining the level of suspension. In such a case, the authorization for suspension may be delayed while the matter is referred to arbitration. Article 22.6 provides that the arbitration is to be conducted by the original panel, "if members are available," or by an arbitrator appointed by the Director-General, and must be completed within sixty days of the expiration of the reasonable period. Article 22.6 further directs that the complaining party not suspend concessions or other obligations while the arbitration is being conducted.

b. Legal Status of Compensation and Suspension

A central—if not *the* central—question on the subject of the implementation of panel decisions is the legal status under the DSU and the WTO agreements of the three possible ways in which a WTO Member can respond to losing a panel or Appellate Body decision: losing Members can respond by (1) implementing the recommendations and rulings fully; (2) providing compensation; or (3) accepting suspension of concessions by the winning party(ies). This issue is addressed most directly by article 22.1, which provides:

> [c]ompensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

Article 22.1 makes two less-than-completely-clear statements. The first sentence provides that compensation and the suspension of concessions are "temporary measures" to be used if the losing defendant does not implement the panel

15. *Id.* art. 22.2 (emphasis added).

or Appellate Body's recommendations within a reasonable period of time. The implication (unstated in the text) is that implementation should, in fact, occur at some point. However, the term "temporary" is not defined, thus leaving open the possibility that it could be a considerable period of time.

The second sentence of article 22.1 provides that neither compensation nor suspension is to be preferred to full implementation. The wording of this sentence does not state that the first option—full implementation—*is* to be preferred, just that the other two options—compensation or suspension—are *not* to be preferred.

In the United States, the Statement of Administrative Action (SAA) to the Uruguay Round Agreements Act (URAA) offers the following comments on article 22.1: "Article 22 makes clear that compensation is intended to be temporary *and that full implementation of a panel or Appellate Body recommendation is the preferred result.*"[16] However, the section of the SAA that deals with "administrative action" to implement the DSU emphasizes the ability of Congress to decide whether any change to U.S. law will be made in response to a panel decision: "[i]f a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made."[17]

Further, the SAA appears to suggest that all three implementation options are possible and that none is preferred:

> The DSU recognizes that it may not be possible for a government to agree to the removal of a measure that a panel has found to be inconsistent with a Uruguay Round agreement. Accordingly, it provides for alternative resolutions, including the provision of trade compensation and other negotiated settlements, or the suspension of benefits equivalent to the "nullification or impairment" of benefits caused by the offending measure.[18]

This view is bolstered by the testimony of Administration officials, who addressed a variety of questions from Members of Congress concerning the impact on U.S. "sovereignty" of the operation of the DSU. In this context, senior Administration officials repeatedly stated that the United States would not be obligated to change any U.S. laws found to be inconsistent with a WTO agreement.[19]

16. Uruguay Round Agreements Act, Statement Of Administrative Action. H.R. Doc. No. 103-316, 103d Cong. 2d Sess. 1016 (1994) (emphasis added).

17. *Id.* at 1032.

18. *Id.*

19. U.S. Government officials have made a number of remarks concerning the WTO's dispute settlement mechanism:

"[N]o ruling by any dispute panel, under this new dispute settlement mechanism . . . can force us to change any federal, state or local law or regulation. Not the city council of Los Angeles, nor the Senate of the United States can be bound by these dispute settlement rulings. . . ." *GATT Implementation: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 104th Cong. (1994) (statement of Amb. Mickey Kantor, United States Trade Representative).

"[A] WTO dispute settlement panel recommendation does not automatically change U.S. law. It has no self-executing effect in the U.S. constitutional system. Only Congress can change that law

Similarly, commentators have also focused on this provision of the DSU and offered their interpretations of its meaning. For example, Judith Hippler Bello has commented that "[l]ike the GATT rules that preceded them, the WTO rules are simply not 'binding' in the traditional sense."[20] Bello continued:

> When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.
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> Rather, the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.[21]

In response, John Jackson examined eleven clauses in the DSU (articles 3:4, 3:5, 3:7, 11, 19:1, 21:1, 21:6, 22:1, 22:2, 22:8, 26:1(b)) and came to a different conclusion:

> I would suggest that the overall gist of those clauses, in the light of the practice of GATT, and perhaps supplemented by the preparatory work of the negotiators (unfortunately not well documented), strongly suggests that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report.[22]

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to implement a panel recommendation. . . ." *The World Trade Organization: Hearing Before the Senate Comm. on Foreign Relations*, 104th Cong. (1994) (statement of Rufus Yerxa, Deputy United States Trade Representative).

"[T]he United States maintains the right to decide whether and how to implement dispute settlement decisions, and the U.S. Congress retains its full powers under our Constitution to change or not to change U.S. laws." *The World Trade Organization: Hearing Before the House Comm. on Ways and Means*, 104th Cong. (1994) (statement of Amb. Mickey Kantor, United States Trade Representative).

"[T]he agreement does not infringe on U.S. sovereignty . . . WTO panel decisions will not have binding force as a matter of U.S. law. Congress must enact any changes in U.S. law that are going to occur." *The Uruguay Round of the General Agreement on Tariffs and Trade (GATT): Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 104th Cong. (1994) (statement of Amb. Mickey Kantor, United States Trade Representative).

"We could be the subject of an adverse ruling. . . . However, then we have a choice. We're not forced to change any law as a result. That's up to the Congress of the United States. We've given up no sovereignty." *GATT Uruguay Round Agreements: Hearing Before the House Comm. on Agriculture*, 104th Cong. (1994) (statement of Amb. Mickey Kantor, United States Trade Representative).

"Nothing in the dispute settlement mechanism . . . requires the United States to change or alter its laws or pass new laws or to repeal old laws. Of course if . . . we're the subject of a negative finding of the panel, we might have to pay either compensation or be the subject of some trade action. That would be a choice we would make. We retain full sovereignty to make those choices on our own." *U.S. Trade Policy: Hearing Before the House Comm. on Foreign Affairs*, 104th Cong. (1994) (statement of Amb. Mickey Kantor, United States Trade Representative).

20. Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416-17 (1996).

21. *Id.* at 417.

22. John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of the Legal Obligation*, 91 AM. J. INT'L L. 60, 62-63 (1997) (footnote omitted).

However, Professor Jackson observed that "[t]he language of the DSU does not solidly 'nail down' this issue."[23] While noting that other international treaties such as article 94 of the United Nations Charter and article 59 of the Statute of the International Court of Justice provide a clearer statement of the obligation, Professor Jackson concedes that the DSU does not contain similar language: "[s]ome sort of comparable language for the WTO Agreement and/or the DSU would have been welcome. . . . But one does not find language of the UN-ICJ type in the DSU."[24]

It is difficult to overstate the importance of this issue to the sound functioning and development of the WTO's dispute resolution process. The question of the specific nature of a WTO Member's legal obligation with respect to an adverse finding in a dispute settlement report goes to the core of the nature of membership in the WTO. With all due deference to Professor Jackson, who makes a number of good and key points in his article, an understanding of this central issue cannot be based on what the overall "gist" of a series of provisions "suggests." Such an obligation must be explicit, affirmatively agreed to and clearly understood by all Members. Imposing such an obligation based on anything less than an explicit provision would create a substantial risk that members would conclude that the dispute settlement system requires of them obligations and actions to which they did not agree. Certainly, that would be the case in the United States. By Professor Jackson's own admission, the DSU does not meet this strict—but, in our view, necessary—test.

C. Step by Step Description of Article 22 Process

If a losing Member has not implemented the panel or Appellate Body decision within the "reasonable period of time," the DSU establishes five essential steps in the compensation/retaliation process provided for at article 22.

1. *Step 1: Enter into negotiations on compensation*

The first step under article 22.2 is that the losing Member shall, if requested by "any party having invoked the dispute settlement procedures," enter into negotiations no later than expiry of the reasonable period "with a view to developing mutually acceptable compensation."

2. *Step 2: Request suspension of concessions*

Article 22.2 further provides that if mutually satisfactory compensation is not agreed upon within twenty days after the expiration of the reasonable period, any winning party may then request authorization from the DSB to suspend application of concessions or other obligations.

23. *Id.* at 62.
24. *Id.*

3. *Step 3: Follow DSU guidance on suspension*

Article 22.3 of the DSU further provides a set of "principles and procedures" that are to be followed by a complaining party in considering what concessions or other obligations to suspend. These "principles and procedures" may be summarized as follows.

The party "should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body decision has found a violation or other nullification or impairment."[25] If the party "[c]onsiders that it is not practicable or effective to suspend concessions or other obligations"[26] in the same sector, it "may seek to suspend concessions or other obligations *in other sectors under the same agreement.*"[27] If the party considers that this is not practicable or effective either, "[i]t may seek to suspend concessions or other obligations *under another covered agreement.*"[28] In other words, article 22 of the DSU establishes a three-tier hierarchy for suspension of concessions that may be summarized as: first option is the same sector; second option is different sector, same agreement; third option is different agreement. The DSU provides a precise definition of the terms "sector" and "agreement" as those terms are used in article 22.3.[29] In summary form, "sector" means: in the case of goods, all goods; in the case of services, one of the eleven "principal sectors" set out in the General Agreement on Trade in Services (GATS);[30] and, in the case of trade-related intellectual property rights, one of the seven types of intellectual property rights provided for in part II (copyright, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, or protection of undisclosed information) or the obligations under parts III or IV of the TRIPS Agreement. Similarly, article 22.3(g) defines "agreement" as being: (1) with respect to goods, the Multilateral Agreements on Trade in Goods taken as a whole along with the Plurilateral Trade Agreements;[31] (2) with respect to services, the GATS; and (3) with respect to intellectual property rights, the TRIPS Agreement.

Article 22.3(d) further directs that in applying the principles described above, the party is required to take into account two factors: (1) trade in the relevant sector and the *importance* of that trade to the complaining party; and (2) "the broader economic elements related to the nullification or impairment and the

25. DSU, *supra* note 2, art. 22.3(a).
26. *Id.* art. 22.3(b).
27. *Id.* (emphasis added).
28. *Id.* (emphasis added).
29. *Id.* art. 22.3(f)(i)-(iii).
30. *Id.* art. 22.3(f)(ii), n.14.
31. The Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement; and the Bovine Meat Agreement. *See* DSU, *supra* note 2, Appendix 1.

broader economic consequences of the suspension of concessions or other obligations."

Article 22.4 stipulates that "[t]he level of suspension of concessions or other obligations . . . shall be equivalent to the level of the nullification or impairment." As discussed below, the appropriate level of suspension of concessions may be submitted to binding arbitration under article 22.6 and 22.7 at the request of the losing defendant. Such binding arbitration has not to date occurred.

Finally, article 22.5 provides that "[t]he DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension."

4. *Step 4: Obtain DSB authorization*

The last step in the implementation/suspension process occurs if a losing defendant does not implement by the end of the "reasonable period of time," established in accordance with the provisions of article 21.3-4, the findings of the panel report. In this event, the winning complainant has the right to request, pursuant to article 22.6, authorization to suspend concessions or other obligations, and this request may be rejected by the DSB only on the basis of a *consensus* (*i.e.*, including the requesting complainant). Article 22.6 further provides that if the losing defendant either objects to the level of suspension proposed or claims that the article 22.3 "principles and procedures" have not been followed, it can refer the matter to arbitration. In that event, the arbitration shall be completed within sixty days of the expiry of the reasonable period, and shall be carried out by the members of the original panel, if they are available. The winning complainant may not suspend concessions until this process is completed.

5. *Step 5: Suspend concessions*

Article 22.8 further provides that the suspension of concessions is to be "temporary" and applied only until the measure found to be inconsistent is removed or provides a "solution" to the nullification or impairment. Article 22.8 further provides that the DSB is required to maintain on its agenda "the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations . . . have not been implemented."

To date, no WTO Member has requested authorization to suspend concessions against another WTO Member.

III. Implementation of Panel and Appellate Body Reports to Date: A Status Report on the Implementation Process

A. Summary

This section will examine and analyze the factual history and the implementation process attendant to the eight cases with respect to which a defending WTO

Member has been found by a panel and/or the Appellate Body not to be in conformity with its WTO obligations and, as a result, has had to implement or is in the process of implementing the recommendations of the panel and/or Appellate Body.

B. Case Histories

1. *U.S.—Standards for Reformulated and Conventional Gasoline*

On January 17, 1996, a panel convened at the request of Venezuela and Brazil decided that regulations under the U.S. Clean Air Act of 1990, promulgated by the U.S. Environmental Protection Agency (EPA) in December 1993,[32] did not meet the requirements of article III:4 of the GATT and could not be justified under article XX, paragraphs (b), (d) or (g).[33] The United States appealed the decision and the Appellate Body largely affirmed (albeit using different reasoning) in a decision issued April 29, 1996.[34] The DSB formally adopted the ruling on May 20, 1996.[35]

The EPA regulations sought to maintain pollution emissions from gasoline combustion at their 1990 levels (or reduce them to those levels).[36] Under the U.S. regulations, domestic refiners were required to establish an individual baseline representing the quality of gasoline produced by that refiner in 1990. In calculating individual "baselines," domestic producers were allowed to select and apply one of *three* methods,[37] while importers were restricted to using one of only *two* methods.

Upon the issuance of the Appellate Body decision, USTR committed to imple-

32. The regulation is formally entitled *Regulation of Fuels and Fuel Additives—Standards for Reformulated and Conventional Gasoline*. 40 C.F.R. 80.

33. *United States—Standards for Reformulated and Conventional Gasoline—Report on the Panel*, WT/DS2/R (Jan. 29, 1996) [hereinafter WTO Panel Report, *U.S—Gasoline*] (visited July 27, 1998) <http://www.wto.org/wto/online/ddf.htm> [hereinafter WTO Website].

34. *See United States—Standards for Reformulated and Conventional Gasoline—AB-1996—Report of the Appellate Body*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Appellate Body Report *U.S.—Gasoline*], *at* WTO Website, *supra* note 33. Although the panel's decision related to both reformulated and conventional gasoline, the Appellate Body decision required changes solely with respect to conventional gasoline pollutant levels. Under the EPA's existing rules, discriminatory treatment of foreign refiners of reformulated gasoline was already scheduled to be phased out by January 1, 1998. *See, e.g., U.S. Will Comply with WTO Gas Panel, But Does Not Say How*, INSIDE U.S. TRADE, June 21, 1996.

35. *Administration Agrees to Comply with WTO Gas Panel by Next August*, INSIDE U.S. TRADE, Aug. 16, 1996.

36. WTO Panel Report, *U.S.—Gasoline*, *supra* note 33, para. 2.5.

37. *See* Appellate Body Report *U.S.—Gasoline*, *supra* note 34, at 5. The three methods were as follows: (1) Method 1 would utilize quality data and volume records of the refiner's 1990 gasoline; (2) Method 2 would allow domestic refiners to use their 1990 gasoline blendstock quality data and 1990 blendstock production records where data from Method 1 were unavailable; and (3) Method 3 would allow domestic refiners to establish individual 1990 baselines on the basis of their post-1990 gasoline blendstock data modeled to show 1990 gasoline composition where data from both Methods 1 and 2 were unavailable. *Id.*

ment the decision, but declined initially to state *how* it would do so.[38] Congress was critical of the WTO decision[39] and implemented an FY 1996 appropriations rider preventing the EPA from allocating money in order to promulgate new regulations that would give effect to the decision.[40]

On June 19, 1996, within the thirty-day period, the United States affirmed that it would "examine any and all options for compliance," while taking into consideration the "key criterion" of "protecting public health and the environment."[41] Accordingly, the EPA commenced a ninety-day comment period seeking public participation in a rule-making process to amend the existing rule.[42]

U.S. gasoline industry members, as well as Venezuela and Brazil, submitted comments as part of the public comment process. The Independent Refiners Coalition (IRC), which led the 1993 lobbying effort that produced the EPA rule, submitted a proposal to allow foreign refiners the same flexibility as domestic refiners have in meeting U.S. pollutant standards.[43] However, the IRC also proposed that foreign refiners should be subject to certain import volume restrictions.[44] Venezuelan and Brazilian refiners submitted their own proposals allowing foreign refiners to set their own pollutant baselines.[45]

In August 1996, the United States reached a tentative agreement with Venezuela for a fifteen-month implementation period.[46] The United States was unable to reach a similar agreement with Brazil,[47] which insisted on an eight- to nine-month implementation plan, a timeframe the United States rejected on the grounds that the EPA typically requires twenty-four to thirty months to revise regulations.[48] Throughout the implementation period, both Brazil and Venezuela continued to raise the issue at the monthly meetings of the DSB.[49]

38. *See, e.g., WTO Body Faults U.S on EPA Rule, but Reverses on Conversation Exception*, INT'L TRADE DAILY (BNA), Apr. 30, 1996.

39. *WTO Supports Venezuela in Decision on Foreign Refiner Rule*, 21ST CENTURY FUELS, Feb. 1, 1997. Senator Bob Dole, a presidential candidate at the time, condemned the WTO ruling as an "attack on the sovereignty of U.S. law." *Id.*

40. *Id.*

41. *U.S. Will Comply with WTO Gas Panel, But Does Not Say How*, INSIDE U.S. TRADE, June 21, 1996.

42. *Id.*

43. *Refiners Suggest Giving Importers Equal Treatment to Settle Gas Fight*, INSIDE U.S. TRADE, Oct. 18, 1996.

44. *Id.*

45. *Id.*

46. This agreement was formally announced at the December 3, 1996 meeting of the DSB. *U.S. Again Rejects Japan Proposal on Liquor Panel Implementation*, INSIDE U.S. TRADE, Jan. 31, 1997.

47. *Administration Agrees to Comply with WTO Gas Panel by Next August*, INSIDE U.S. TRADE, Aug. 16, 1996.

48. *Id.* The EPA rulemaking process requires, inter alia, that proposed changes are published in the Federal Register and that they are approved by the Office of Management and Budget.

49. *Venezuela, Brazil Press U.S. on Implementation of Gas Panel Ruling*, INSIDE U.S. TRADE, Jan. 24, 1997. At the January 22, 1997 meeting of the DSB, Venezuela and Brazil expressed concern that the United States would not bring regulations into conformity with the WTO decision by the August 20, 1997 deadline. The parties were concerned at the number of steps required in order to formally promulgate regulations under U.S. law. *Id.*

In January 1997, the EPA issued a draft proposal in an attempt to comply with the Appellate Body decision.[50] The proposal included provisions subjecting foreign and domestic refiners to the same standards, with the additional requirement that foreign refiners provide information on transportation methods, as well as test data and documentation establishing the source of their gasoline. Under the new rules, foreign refiners would have the option—denied them under the prior regulation—of using individual baselines to certify conventional gasoline.[51] The EPA finalized the new regulations on August 27, 1997, one day before the expiration of the fifteen-month deadline.[52] Brazil and Venezuela expressed satisfaction with the new regulations.

As the first WTO case to test the implementation provisions of the DSU, the *United States—Gasoline* case is noteworthy in two respects. First, implementation was accomplished within the fifteen-month guidepost established at article 21.3(c). In the context of this case, the use of the fifteen-month suggested timeframe as target is both good news and bad news, but mostly good news. The United States rejected the shorter period of time requested by Brazil, and an argument could be made that, given the history of the provision, speedier action might have been possible. However, as a practical matter, fifteen months is a relatively quick turnaround for agency action on this type of issue.

Second, both the problem raised and the decision in the case were relatively uncomplicated: *de jure* differential treatment that had to be effectively equalized. In other words, the decision did not leave room for much disagreement between the complaining and defending parties over the actions that needed to be taken. Political constituencies were placed on notice as to what steps would have to be taken and could begin to prepare substantive and political positions to accommodate themselves to that end result. As we discuss below, future cases may not always be as straightforward.

2. *Japan—Taxes on Alcoholic Beverages*

On July 11, 1996, a panel convened at the request of the European Union (EU), Canada, and the United States found that Japan's taxation scheme, under which it assessed higher taxes on various imported liquor products than on domestically-produced *shochu*, was inconsistent with Japan's obligations under article

50. *Refiners Offer New Proposal for EPA to Comply with WTO Gas Ruling*, INSIDE U.S. TRADE, Feb. 7, 1997.

51. *EPA Gives Foreign Refiners Option to Set Individual Baselines*, OCTANE WK., Aug. 25, 1997.

52. *Based on Outcome Of WTO Dispute about Imported Gasoline, U.S. Environmental Protection Agency Issues Baseline Requirements for Foreign Gasoline*, INT'L LAW UPDATE, Oct. 7, 1997. The effective date of the rule is August 27, 1997. *Id.*

III:2, of the GATT 1994.[53] On October 4, 1996, the Appellate Body affirmed, with some modification, the panel's determination. The decision was formally adopted by the DSB on November 1, 1996.[54]

Japan acknowledged its obligation to implement the terms of the Appellate Body decision, but sought a "reasonable" period of time within which to comply.[55] Japan did not propose a particular period of time to the DSB as provided at article 21.3(a); rather, it indicated that it would initiate negotiations with the EU, Canada and the United States on what would constitute a "reasonable period" in this case.

In December 1996, Japan proposed an implementation plan to be instituted in three stages over five years, allowing Japan to retain a three percent greater tax on foreign liquors than on its domestic *shochu*.[56] The EU was able to reach agreement with Japan on an accelerated reduction of the tariff rates on whisky and brandy as compensation for delayed implementation on other products. The EU indicated that this agreement did not prejudge their position on the issue of a "reasonable period of time."

The United States rejected Japan's proposal and insisted that Japan meet—at a minimum—the notional fifteen-month deadline set out at article 21.3(c).[57] When the parties were unable to come to a satisfactory agreement within forty-five days of the adoption of the Appellate Body report, the United States, on December 24, 1996, requested arbitration pursuant to article 21.3(c) of the DSU.[58]

Even as the United States moved to invoke the arbitration process, Japan continued to argue that it would not be able to comply with a fifteen-month implementation deadline, even if an arbitrator were to so decide, because of

53. *See generally Japan—Taxes on Alcoholic Beverages—Report of the Panel*, WT/DS8/R at 121 (July 11, 1996) [hereinafter WTO Panel Report *Japan Liquor*], *at* WTO Website, *supra* note 33.

54. Formal adoption of the WTO ruling was initially delayed when Japan objected to the absence of a proper quorum at the October 29, 1996 meeting of the DSB. *See Japan Uses Procedural Move to Delay Adoption of Liquor Report*, INSIDE U.S. TRADE, Nov. 1, 1996. This is the only time that a WTO Member has used this extraordinary procedural objection to block, albeit temporarily, one of the four key steps in the dispute settlement process. *See id.*

55. *See WTO Panel Formed on Helms-Burton; Japan Accepts Liquor Ruling*, INSIDE U.S. TRADE, Nov. 22, 1996.

56. *See U.S. Requests Arbitration Over Japan's Implementation of Liquor Panel*, INSIDE U.S. TRADE, Jan. 10, 1997. Specifically, the Japanese plan would raise the tax on *shochu* from 4.084 yen per liter per proof to 6.028 yen in October 1997, to 7.976 yen in October 1998, and to 9.924 yen in October 2001. *See* Masato Ishizawa, *WTO Ruling Pushes Shochu Makers to Reinvent Product*, THE NIKKEI WKLY., Mar. 31, 1997. The tax on whiskey would be reduced from 24.558 yen per liter per proof to 13.775 yen in October 1997 and to 10.225 yen in October 1998. *See id.*

57. *See U.S. Again Rejects Japan Proposal on Liquor Panel Implementation*, *supra* note 46.

58. *See U.S. Requests Arbitration Over Japan's Implementation of Liquor Panel*, *supra* note 56. When the United States and Japan were unable to agree on the appointment of an arbitrator within the ten days envisaged under article 21.3(c), the United States requested that the WTO Director-General do so. The Director-General appointed Ambassador Julio LaCarte, the Presiding Member of the Appellate Body panel that had decided the *Japan—Liquor* appeal. *See id.*

domestic political opposition and the complexities involved in changing its tax code.[59] In mid-January 1997, Japan attempted to forestall the arbitration process by offering to accelerate its tax cuts on U.S. bourbon such that it would bring itself into full compliance by 2001.[60] The United States again rejected the offer.[61]

The arbitrator decided that all of the original parties to the dispute could "participate" in the arbitration process, notwithstanding that the United States alone had requested binding arbitration. The EC, in particular, had sought to join the proceeding out of concern that the United States might be able to strike a better deal with Japan as a result of the arbitration decision than the EC had already negotiated. In response, Japan agreed that the EC would have further negotiation rights in the event that the United States obtained a more favorable arrangement through arbitration.[62]

The arbitral decision focused on the interpretation of the last sentence of article 21.3(c), which provides: "[h]owever . . . the reasonable period of time may be shorter or longer than the fifteen months, depending upon the 'particular circumstances.' "[63] The United States argued that only two sets of criteria were relevant to the interpretation of the term "particular circumstances:" (1) "the type (legislation, regulation, decree, etc.) and technical complexity (e.g. making a simple change in a tariff rate, as compared to making more complex changes like the development of a new scientific standard) of the measures that the Member must draft, adopt and implement;" and (2) "the minimum period of time in which the Member can achieve implementation, assuming that the Member acts in good faith."[64] The United States argued that the term "particular circumstances" should *not* "imply a policy judgment, but rather a technical inquiry into the domestic legislative or regulatory system in the Member country concerned."[65] The United States argued strongly against including political considerations in the timing decision, stating: "[t]he question for the arbitrator is what is the shortest period of time in which implementation can practicably take place, not

59. *See U.S. Rejects Japan Tariff Deal in Liquor Panel Implementation Fight*, INSIDE U.S. TRADE, Jan. 17, 1997. An unidentified Finance Ministry official said that it would be too difficult for Japan to change its reform plan, as it had already submitted a proposal to the Diet. *See Japan to Do Its Best for Liquor Tax Accord with U.S.*, JAPAN ECON. NEWSWIRE, Feb. 17, 1997.

60. *See Uruguay Official Appointed to Mediate Liquor Tax Dispute Between U.S., Japan*, INT'L TRADE DAILY (BNA), Jan. 21, 1997.

61. *See U.S., Japan Agree to Extend Liquor Panel Arbitration Deadline*, INSIDE U.S. TRADE, Jan. 24, 1997. The parties agreed to extend the normal ninety-day deadline for completion of the arbitration process before the request for arbitration was made only on the fiftieth day. *See also* Julio Lacarte-Muró, *Japan—Taxes on Alcoholic Beverages, Arbitration under article 21.(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS8/15 at para. 3 (Feb. 14, 1997) [hereinafter Arbitrator's Decision *Japan Liquor*], *at* WTO Website, *supra* note 33.

62. *See EU, Japan Agree on Implementation of WTO Liquor Tax Decision*, INSIDE U.S. TRADE, Feb. 7, 1997.

63. Arbitrator's Decision *Japan Liquor*, *supra* note 61, para. 11.

64. *Id.* para. 12.

65. *Id.* para. 13.

whether a longer period of time would make implementation less burdensome and painful for the implementing Member."[66]

Japan argued that the term "reasonable period of time" should be interpreted in light of the DSU's general objective of prompt compliance, but also the DSU's clear allowance for flexibility in implementation, as reflected in the "particular circumstances" language. Japan argued the "particular circumstances" language of article 21.3 justified its proposed three-phase, twenty-three-month/five-year plan on the grounds that: (1) the executive has limited powers over taxation and there is a need for formal legislation to implement the decision; (2) the adverse effects of the liquor and consumption tax increases will have on Japanese consumers, and that such increases are normally carried out in one-year increments; and (3) the "administrative constraints" on the execution of taxation, namely that the changes will have to be notified and explained to 180,000 wholesalers and retailers in advance and that these businesses will need time to adjust their computer programs and advertising materials.[67]

The EC argued that the "reasonable period of time" should, in general, be fifteen months. Canada argued that Japan's proposal clearly fell outside the "reasonable period of time." In addition, Canada made two further points concerning the "particular circumstances" language: (1) that the term should be applied on a *sui generis* basis, based on the unique facts of each case; and (2) Japan's argument that the greater tax differential with respect to *shochu B* than with respect to *shochu A* qualifies as a "particular circumstance" was tantamount to arguing that "the greater the degree of inconsistency with WTO obligations, the greater the period of time a Member should be granted to bring that measure into conformity with the WTO Agreement."[68]

The arbitral decision did not address any of these arguments. Instead, in a terse, one-paragraph "award," the arbitrator asserted:

> [i]n this case, I am not persuaded that the "particular circumstances" advanced by Japan and the United States justify a departure from the 15-month "guideline" either way. I conclude, therefore, that a "reasonable period of time" within the meaning of article 21.3(c) of the *DSU* for Japan to implement the recommendations and rulings of the DSB of 1 November 1996 in *Japan—Taxes on Alcoholic Beverages* is 15 months.[69]

Despite the arbitration ruling, Japan continued to resist U.S. demands to implement the WTO decision fully by February 1998. Japanese officials reiterated that the ruling would require approval from Japan's Diet, that there was considerable domestic political opposition to the proposed changes,[70] and that Japan needed

66. *Id.*
67. *Id.* paras. 17-21.
68. *Id.* para. 26.
69. *Id.* para. 27.
70. *See Japan Searching For Response to WTO Arbitration Ruling on Liquor*, INSIDE U.S. TRADE, Feb. 21, 1997.

time to notify its 180,000 *shochu* wholesalers and retailers of the changes and to allow for market adjustments.[71]

In June 1997, the U.S. and Japan returned to negotiations on the implementation issue;[72] however, the talks again failed to result in an agreement. Japan proceeded with its own implementation plan.[73]

On December 17, 1997, the United States announced that it had reached a settlement with Japan.[74] Under the terms of the settlement, Japan committed to adjust excise taxes on *shochu A* by May, 1, 1998. In turn, excise taxes on *shochu B* would be adjusted by October 1, 2000. Japan further agreed to undertake a number of additional changes, including: (1) elimination of tariffs on all brown spirits (including whisky and brandy), vodka, rum, liqueurs, and gin by April 1, 2002; (2) disclosure of any measures or subsidies for Japan's domestic distilled spirits industry that the government might undertake; and (3) disclosure of any existing measures that may nullify or impair the benefits of the settlement.[75]

The *Japan—Liquor* case is significant in at least two key respects. First, the case illustrates the range of possibilities available both to prevailing parties seeking to enforce a WTO decision and defending parties seeking to implement within the DSU's parameters.[76] In this instance, while two of the prevailing parties (Canada and the EC) negotiated an agreement with the losing country (Japan), the United States held out for a better deal and one more consistent, in the U.S. view, with DSU requirements. When the United States invoked the binding arbitration provisions of article 21.3(c), the other complaining parties joined in and all three benefited from the result. From the vantagepoint of losing countries, the case illustrates that WTO-inconsistent measures can be phased out or brought into compliance over substantially longer than the benchmark fifteen months of article 21, provided that sufficient other concessions are made to compensate for the longer phaseout.

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71. *See id.*; *see also Japan to Continue Talks with U.S. on Liquor Taxes,* INT'L TRADE DAILY (BNA), Feb. 19, 1997. Japanese Ministry of Finance officials have expressed the need for the extended five-year plan in order to protect *shochu* makers, all of which Japan claims are small, economically-fragile businesses that endured tax hikes of seventy-five percent in 1989 and forty-five percent in 1994 in spite of double-digit declines in demand. *See id.*

72. *See Japan, U.S. Resume Talks on Liquor Tax Gaps,* JAPAN WKLY. MONITOR, June 9, 1997.

73. *See Japanese Liquor Taxes Still an Issue,* JEI REP., Mar. 7, 1997. For example, during the first week of October 1997, Japan lowered the price of a 0.7 liter bottle of whisky by about 300 yen, and raised the price of a 1.8 liter bottle of *shochu* by about 90 yen. *See Liquor Tax Changes Buoying Whiskey Makers,* JIJI PRESS TICKER SERV., Sept. 29, 1997.

74. Office of the United States Trade Representative, *U.S. Settles Successful WTO Case Opening Japanese Market for Distilled Spirits and Eliminating Discriminatory Taxes and Tariffs,* USTR Press Release, Dec. 17, 1997; *see also U.S. Claims Victory in WTO Settlement with Japan Over Liquor Tax,* INSIDE U.S. TRADE, Dec. 19, 1997.

75. *See U.S. Settles Successful WTO Case Opening Japanese Market for Distilled Spirits and Eliminating Discriminatory Taxes and Tariffs, supra* note 74.

76. *See id.* Based on the WTO rules, the United States could be given a remedy even if Japan fails to comply with the arbitrator's ultimate determination, because the United States would then be entitled to compensation. *See U.S., Japan Agree to Extend Liquor Panel Arbitration Deadline, supra* note 61.

Second, the arbitrator's decision, in its terse rejection—without any reasoned elaboration—of the guideposts proposed by the United States and Japan for interpreting the "particular circumstances" language of article 21.3(c) provides little guidance to future parties or arbitrators as to what types of situations, if any, may qualify for "particular circumstances" treatment. In so doing, the decision provides little guidance as to the circumstances, if any, under which parties may be required to implement in less than fifteen months or, in the alternative, the circumstances, if any, in which parties may be able to take more than fifteen months. In fact, the decision leaves the impression that fifteen months will be the norm absent a compelling case to the contrary.

In our view, the arbitrator's decision is disappointing in two respects from the standpoint of effective application of the implementation provisions of the DSU. First, the decision appears to place more emphasis than seems warranted under the DSU text on the fifteen-month benchmark. Second, the decision missed an important opportunity to begin to define the parameters of what may qualify as "particular circumstances." For example, both the United States and Japan proposed that one consideration should be the type of measure at issue: e.g., regulation versus legislation, or, in short, whether executive branch action alone will suffice or whether action by the legislature is required. This would appear to be a useful parameter, albeit one that should not be applied mechanically.

The other factors suggested by the United States and Japan also deserved discussion, although the merits of these factors are less clear. For example, the U.S. suggestion that the arbitrator determine the minimum period of time that a measure could be implemented in good faith could entail a highly intrusive and subjective evaluation of a country's capacity for taking action. Similarly, Japan's second proffered factor—adverse impact on constituencies—would invite a consideration of the degree of benefit domestic constituencies were receiving from a measure, and the magnitude of the consequent loss of those benefits when the measure was reformed or removed, as a potentially mitigating factor in implementation. As the Government of Canada aptly observed, considering this factor could enable governments to attempt to delay implementation for the longest time of measures that were the most inconsistent with WTO obligations. Japan's third proffered factor, "administrative constraints," has greater validity; however, it would need to be examined with a careful and critical eye to ensure that any such "constraints" were actual and not simply convenient excuses.

In sum, the arbitrator's decision, by its brevity, preserved the maximum latitude for future arbitrators' interpretations of article 23.1(c). That benefit, in our view, is more than offset by the lack of guidance the decision provides to parties considering use of binding arbitration in future cases.

3. *U.S.—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*

On November 8, 1996, a panel convened at the request of Costa Rica concluded that the United States violated its obligations under articles 6.2 and 6.4 of the

Agreement on Textiles and Clothing (ATC) by imposing a safeguard quota on imports of Costa Rican-produced underwear without having demonstrated that the imports caused serious damage or actual threat of damage.[77] Costa Rica had requested that the panel recommend, in accordance with article 19.1 of the DSU,[78] that the United States immediately withdraw the offending measure.[79] In accordance with Costa Rica's request, the panel recommended prompt removal of the measure and withdrawal of the quantitative restrictions imposed by the measure.[80] Costa Rica appealed the decision and on February 10, 1997, the Appellate Body upheld the panel determination, with certain modifications.[81]

In response to the ruling, the United States decided to allow the measure to expire on March 27, 1997, stating " 'we . . . have no intention of doing anything further and consider ourselves in line with what the [World Trade Organization] panel recommended.' "[82]

4. *U.S.—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*

On January 6, 1997, a panel convened at the request of India determined that the United States violated its obligations under articles 2 and 6 of the ATC by imposing a transitional safeguard restraint on imports of woven wool shirts and blouses from India.[83] The panel further concluded that the U.S. action constituted a prima facie case of nullification or impairment of the benefits accruing to India under the ATC.[84] India appealed certain issues of law in the panel report. On April 25, 1997, the Appellate Body affirmed the legal findings and conclusions of the panel,[85] and the DSB formally adopted the decision on May 23, 1997.

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77. *See United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear—Report of the Panel*, WT/DS24/R para. 7.47-7.55, (Nov. 8, 1996) [hereinafter WTO Panel Report *U.S.—Fibre Underwear*], *at* WTO Website, *supra* note 33. The panel further concluded that the United States violated article 6.6(d) of the ATC by not granting treatment more favorable to Costa Rican re-imports. *Id.* paras. 7.56-7.59.

78. Article 19.1 of the DSU provides:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the member concerned could implement the recommendations. *Id.* para. 8.1 ((footnotes omitted) (citing to art. 19.1)).

79. *Id.* para. 3.2.

80. *Id.* para. 8.3.

81. *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear—Report of the Appellate Body*, WT/DS24/AB/R (Feb. 10, 1997), *at* WTO Website, *supra* note 33.

82. Jim Ostroff, *Costa Rica Underwear Quota Dropped*, DAILY NEWS REC., Apr. 2, 1997.

83. *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India—Report of the Panel*, WT/DS33/R para. 8.1 (Jan. 6, 1997), *at* WTO Website, *supra* note 33.

84. *Id.*

85. *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India—AB-1997-1—Report of the Appellate Body*, WT/DS33/AB/R (Apr. 25, 1997), *at* WTO Website, *supra* note 33.

In practical terms, the WTO decision had little effect on imports of Indian woven wool shirts and blouses, because the United States withdrew the quotas in December 1996, after U.S. officials noted a steady decline in imports.[86] Nevertheless, India termed the ruling an important "psychological victory."[87]

5. *Canada—Certain Measures Concerning Periodicals*

On March 14, 1997, a DSB panel ruled in favor of the United States in its complaint against Canada with respect to three measures. The panel held that: (1) Tariff Code 9958, which prohibits the importation into Canada of certain periodicals, is inconsistent with article XI:1 of the GATT 1994; (2) Part V.I of Canada's Excise Tax Act, which imposes an eighty percent tax on all advertisements contained in "split-run" edition periodicals, is inconsistent with article III:2; and (3) Canada's application of a discounted postal rate for domestically-produced periodicals is not proscribed under article III since it constitutes a subsidy paid exclusively to domestic producers justified under article III:8(b).[88] On June 30, 1997, the Appellate Body affirmed the panel's ruling with respect to the first two measures, and reversed the panel's conclusion with respect to article III:8(b).[89] The DSB formally adopted the ruling on July 30, 1997.[90]

The Government of Canada pledged to implement the ruling, but also announced that it planned to introduce later in 1998 new measures to support domestic magazines[91]—for example, taxes on the advertiser rather than on the publisher, and postal subsidies paid directly to domestic publishers rather than differential postal rates for Canadian and foreign publishers.[92] In addition, Heritage Minister Copps stated that her ministry would develop new measures "to protect the Canadian magazine industry's share of advertising dollars."[93] Copps also published a discussion paper, which invited comments by March 20, 1998, on how the Canadian film industry might be encouraged through subsidies or other protective measures. Canada also began working to build support for its position among

86. *See* Manik Mehta, *WTO Backs India in U.S. Textile Row*, THE ETHNIC NEWSWATCH, Jan. 17, 1997.

87. *See id.*

88. *Canada—Certain Measures Concerning Periodicals—Report of the Panel*, WT/DS31/R para. 6.1 (Mar. 14, 1997) [hereinafter WTO Panel Report *Canada—Periodicals*], *at* WTO Website, *supra* note 33.

89. *Canada—Certain Measures Concerning Periodicals—AB-1997-2—Report of the Appellate Body*, WT/DS31/AB/R at 34 (June 30, 1997) [hereinafter Appellate Body Report *Canada—Periodicals*], *at* WTO Website, *supra* note 33.

90. *See Canada: Plans Coming Next Month for U.S. Magazine Ruling*, E. TIMES, July 30, 1997.

91. *See* John Schofield, *Back to Square One*, MACLEAN'S, July 14, 1997.

92. *See Reconcile Global Trade with Cultural Sovereignty*, THE FIN. POST (Toronto), July 22, 1997.

93. John Schofield, *Back to Square One*, MACLEAN'S, July 14, 1997. By contrast, Trade Minister Art Eggleton questioned the viability of maintaining protective measures and argued that the survival of the country's cultural industries should depend on their " 'ability to find an international audience.' " Marci McDonald, *Menacing Magazines*, MACLEAN'S, Mar. 24, 1997 (quoting Minister Art Eggleton).

potential allies such as France, Italy, and certain countries in the Pacific Rim and Central and South America by casting the issue broadly as a question of preservation of cultural sovereignty and national cultural policies.[94] At the same time, Canadian magazine publishers, concerned that they would be unable to raise advertising revenue without the favorable laws, started changing the appearance and content of their publications and called on the Canadian government to negotiate a settlement with the United States that would allow some protection of Canadian magazines before Canada was required to implement the WTO ruling.[95]

In response and to warn Canada against any new protectionist initiatives, the Office of the U.S. Trade Representative (USTR) asked U.S. film and other "cultural" industries to identify Canadian government practices that cause them harm. The USTR requested industry comments by February 23, 1998, and stated that it would investigate them and possibly seek further remedies against the Government of Canada.[96] Thereafter, on July 29, Canada announced that it would revoke Tariff Code 9958 and part V.1. of Canada's Excise Tax Act, and that the postal rate subsidies would be replaced with direct subsidies to Canadian magazines. However, Canada also announced that it would prevent Canadian advertising from purchasing ads in non-Canadian magazines.[97] The United States responded that such a prohibition "would be every bit as inconsistent with Canada's international trade obligations as its current discriminatory practices."[98]

6. *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*

On May 22, 1997, a panel convened at the request of Ecuador, Guatemala, Honduras, Mexico, and the United States determined that the EC's banana import regime and its licensing procedures for the importation of bananas were inconsistent with various obligations of the GATT 1994 and related WTO Agreements. The EC appealed certain aspects of the panel ruling. In its September 9, 1997

94. *See* Lawrence Herman, *Canada Not Close to Losing National Cultural Policy*, THE FIN. POST (Toronto), Feb. 26, 1997. Canada has also suggested that it would push harder for a renegotiation of cultural exemptions for Canadian "cultural" products and services in NAFTA and other trade agreements such as the Multilateral Agreement on Investment (MAI), currently being negotiated in the OECD. *See Canada Trade: WTO Ruling Raises Ante for Domestic Magazines*, EIU VIEWSWIRE, Sept. 12, 1997. The United States responded by reiterating its opposition to cultural exemptions, including any additional provisions in the NAFTA or MAI. *See* John Schofield, *Publish or Perish*, MACLEAN'S, June 2, 1997.

95. *See id.*

96. *See* Courtney Tower, *Canada, US Solicit Advice from Citizens on Reel Matters*, J. OF COM., Feb. 9, 1998.

97. *Canada Gives Ground in Border Dispute over Magazines, but the United States is not Satisfied*, N.Y. TIMES, July 30, 1998.

98. Office of the U.S. Trade Representative, Press Release 98-70 (July 29, 1998).

report, the Appellate Body upheld most aspects of the panel decision.[99] The DSB adopted the report on September 15, 1997.

The WTO decision caused a predictable split within the EC. Six EC-Member States, led by the United Kingdom, Spain, and France, together with EC Agriculture Commissioner Franz Fischler, strongly objected to implementing the required changes, and argued for protection of the economies of their former colonies.[100] These countries urged alternatives to compliance with the WTO decision, such as payment of compensation to the complainants. The European Parliament also voiced its support for the continuation of trade preferences for African-Caribbean-Pacific (ACP) banana growers under the Lomé Convention.[101] On the other hand, nine EC-Member States led by Germany and the Netherlands expressed support for implementation of the WTO decision and the hope that it would reduce EC market prices for bananas by increasing imports of the cheaper Latin American varieties.[102]

Despite the internal conflict among its members, the EC committed publicly to complying with the WTO decision.[103] However, the EC refused to disclose any details on an implementation plan until "a later date."[104] The EC also commented that it would maintain some trade preferences for ACP-produced bananas, particularly bananas produced in Caribbean countries, arguing that full implementation would effectively eliminate the Caribbean banana industry.[105]

The United States declared that it would accept only a full dismantling of the EC banana regime.[106] The United States also protested the EC's refusal to provide opportunities for "informal consultations" so that interested parties might participate in the implementation process.[107]

In response, the EC stated that it is not required by the DSU—prior to the expiration of the implementation deadline—to negotiate with the United States or other complainants on the substance of the changes it intends to make to its

99. *European Communities—Regime For the Importation, Sale and Distribution of Bananas—AB-1997-3*, WT/DS27/AB/R at 107 (Sept. 9, 1997) [hereinafter Appellate Body Report *EC—Bananas*], *at* WTO Website, *supra* note 33.

100. *See EU Accepts Ruling On Banana Regime*, FIN. TIMES, Sept. 26, 1997.

101. *See Bananas: EU Agree To Abide By WTO Ruling*, EUR. REP., Sept. 27, 1997.

102. *See* Michael Mann, *Europe Won't Import More Bananas from Latin America*, INFOLATINA, Jan. 15, 1998.

103. *See id.*

104. *See id.*

105. An EC communique states that, without the import licensing arrangements, "Caribbean bananas are not able to compete with cheaper Latin American bananas . . . with devastating consequences not only for the banana industry, but also for the economic, social and political stability of the Caribbean countries." Martin Burdett, *Caribbean Faces Economic Ruin Over Banana Trade*, THE ETHNIC NEWSWATCH WKLY. J., Apr. 1, 1997.

106. *See id.*

107. *EU, US Make Case to Arbitrator on Bananas Next Week*, INSIDE U.S. TRADE, Dec. 19, 1997. The United States argues that in implementing *U.S.—Standards for Reformulated and Conventional Gasoline* it allowed Venezuela, Brazil and other interested parties the opportunity to participate in the public comment process. *See id.*

banana import regime.[108] Instead, EC officials contend they will be required to consult on substantive issues only if the EC's actions are found, *after* expiration of the reasonable period for implementation, to be out of conformity with the EC's international obligations.[109]

The EC's unwillingness to specify an implementation plan foreshadowed a potentially substantial dispute between itself and at least some of the complainant countries, particularly the United States, over two issues: (1) what constitutes "adequate" implementation of the WTO decision; and (2) the extent of a losing defendant's obligations to explain and carry out implementation steps during the "reasonable period."

On November 17, 1997, unsatisfied with EC statements concerning implementation, the United States, Honduras, Guatemala, Ecuador, and Mexico requested binding arbitration[110]. The complainants asserted that the EC was not entitled to the full fifteen-month implementation period because, *inter alia*, the EC had not explicitly stated its intention to implement the WTO decision fully.[111]

On January 8, 1998, the WTO-appointed arbitrator, Appellate Body Member Said El-Naggar, found that the EC would have fifteen months and one week to implement the WTO decision and bring its banana import regime into compliance.[112] In so finding, the arbitrator accepted the EC's position that "the complexity of the implementation process" justified the fifteen-month period.[113] The arbitrator also concluded that "[t]he complaining parties have not persuaded me that there are 'particular circumstances' in this case to justify a shorter period of time for implementation."[114]

The arbitrator's "award" in this case included only slightly more articulated reasoning than did the award in the *Japan—Liquor* decision. After rejecting the complainants' request for an implementation period shorter than fifteen months, the *EC—Bananas* arbitrator stated: "At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline."[115]

This language in the decision suggests two conclusions that may be relevant to future cases. First, the arbitrator noted that the "complexity of the implementation process" was "demonstrated" by the implementing member. This comment

108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.* The United States maintains the EU has merely stated it would abide by its international obligations. *See id.*
112. Said El-Naggar, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas—Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS27/15 at 6 (Jan. 7, 1998) [hereinafter *Bananas Arbitration*], *at* WTO Website, *supra* note 33.
113. *Id.*
114. *Id.*
115. *Id.*

suggests that implementing countries will have to *demonstrate* the asserted complexity of an implementation process and not simply *assert* such complexity. In the EC's case, the elements of "complexity" included: (1) the EC's having to "strike a difficult balance" in amending its banana import regime between its WTO obligations and its obligations under the Lomé Convention;[116] (2) "a complex legislative procedure" involving a number of different entities within the EC;[117] (3) the requirement under the Lomé Convention of consultation with ACP States prior to taking definitive action;[118] (4) requirements that "administrative changes" affecting customs treatment of products enter into force only on January 1 or July 1 of each year; and (5) a "reasonable lead time" to notify private parties in the "banana supply chain" to make the necessary adjustments.[119]

The arbitral decision does not specify which of these factors the arbitrator may have found most persuasive. Certainly, the EC could make a strong case that its regime was administratively cumbersome and that altering it would also be administratively cumbersome. In that regard, the arbitrator's decision appropriately takes into account practicality. However, from a policy standpoint, there is little reason that administratively cumbersome forms of protection should be given greater leeway in implementation than simpler forms of protection.[120]

The arbitral decision may have relevance also in that it states that it is the "complexity of the implementation process" that "suggests adherence to the [fifteen-month] guideline." This indicates, somewhat in distinction to the first arbitral decision, that even implementing Members that can demonstrate "complexity" will have to implement within the fifteen-month period.

Finally, the arbitral decision can be considered a "win," however modest, for the complaining countries, in one respect. Prior to the arbitral proceeding, the complaining countries had asserted that the EC had not committed itself to full implementation within the fifteen-month period. The decision noted, however, that at the hearing, the EC did in fact commit to full implementation within the time to be specified by the arbitrator.[121]

On January 14, 1998, the EC adopted a proposal to modify its banana regime. The EC's proposal is almost as byzantine as the existing regime and we will not get into the details of it here. However, it is notable in two key respects: (1) it appears to hold out the promise of shifting existing quota allocations in a way that favors, to some extent, certain complainants in the case over or more than

116. *See id.* at 2.
117. *See id.*
118. *See id.* at 3.
119. *See id.*
120. Indeed, prior to the *Japan—Film* decision, the GATT/WTO had developed a long and impressive history of striking down nontransparent and/or indirect forms of protection. *See, e.g.*, GATT Dispute Panel Report on Italian Discrimination Against Imported Agricultural Machinery, Oct. 23, 1958, GATT B.I.S.D. (7th Supp) at 60 (1959).
121. *See Bananas Arbitration, supra* note 110, at 5.

others; and (2) the proposal does so in a manner that is far from clear and depends to a large extent on bilateral negotiations between the EC and each of the winning WTO Members. The plan's opaqueness both makes it difficult to challenge and plays to the potentially conflicting interests of the several WTO complainants.

The EC's proposal has succeeded in creating divisions among the complaining countries. The United States, which initiated the complaint on behalf of Central American banana producers such as Dole, Chiquita Brands, and Del Monte, has stated that the draft proposal fails to meet the WTO rules and suggested that additional U.S. challenges are likely.[122] The United States maintains that the proposal would result in a "two-track tariff quota" that allocates restrictive quotas to Latin American suppliers while continuing to provide ACP countries with quotas that exceed their past shipments.[123] The United States would like to see the EC abolish tariff quotas altogether and avoid allocating import licenses on the basis of historic market share.[124]

By contrast, Ecuador, which was initially critical of the proposal, later stated that it could "live with [the EC] reforms" if the new system allocates a market share that reflects the money it has spent on licenses in the past.[125] Ecuador, the largest country-supplier of bananas to the EC, apparently believes that new negotiating procedures under the EC proposal will increase its market share.[126]

As of July 1998, the United States and EU remained far apart over the EU's implementation obligations.[127] In particular, the USTR, Ambassador Barshefsky, described a July 1998 EU plan for implementation as failing "to make any significant changes to bring the EC's regime in line with WTO provisions."[128]

The EC's implementation of the *EC—Bananas* case, still a work in progress as this comment goes to print, raises a number of important issues related to implementation of panel decisions. First, as in the *Canada—Periodicals* case, the EC's statements and actions reveal that the implementation process under the DSU is essentially a *political* process comprised of at least two key dimensions. The first dimension comprises the political dynamics *within* the losing WTO Member: factors such as the nature and strength of domestic opposition to implementation; and tools that domestic constituencies have at their disposal to slow or derail implementation.

The second political dimension of implementation is comprised of the political dynamics *within the WTO* for slowing, mitigating, or derailing the impact of a

122. *See* Niccolo Sarno, *EU Banana Rule Changes Endanger Caribbean Producers*, INTER PRESS SERVICE, Jan. 15, 1998.

123. John Zaracostas, *Changes to the EU Banana Import Regime Blasted*, J. OF COM., Jan. 23, 1998.

124. *See Ecuador Set to Drop Case*, FIN. TIMES (London), Jan. 27, 1998.

125. *Id.*

126. *See id.*

127. Office of the Trade Representative, *USTR Barshefsky Reacts to EU Banana Decision*, Press Release 98-63.

128. *Id.*

panel or Appellate Body decision on a domestic measure: e.g., mobilization of other Members to support a losing defendant; sowing the seeds of opposition to full implementation in one or more of the winning complainant Members (such as the EC has attempted to do by arguing that by pressing for full implementation, the United States would be responsible for the death of the Caribbean banana industry and attendant economic, political and social consequences); and seeking to divide and conquer winning complainant countries.

In short, the implementation process provides an opportunity for a losing defendant to open various political fronts to stall or mitigate implementation, possibly even to "claw back" through implementation points that may have been lost in the panel or Appellate Body stage. The process as it is unfolding in the *EC—Bananas* case underscores the highly political nature of the implementation process, albeit operating within some relatively loose juridical parameters.

In addition, the *EC—Bananas* case raises squarely the issue of to what extent winning complainants have a right to participate in the formulation and ongoing review—*during* the implementation period—of a losing defendant's implementation plan. Article 21.5 provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings such dispute shall be decided through recourse to these dispute settlement procedures," including a "quickie" ninety-day panel report.

In our view, to ensure effective implementation, Members should be able to invoke the article 21.5 procedure *during* the "reasonable period of time." Requiring winning parties to wait until the end of the implementation period could effectively delay implementation until the very end of the period and possibly longer.

Further, the EC's opaque plan illustrates that even if available to winning complainants during the fifteen-month period, it may be extremely difficult for them to demonstrate that the defending countries' actions, or lack thereof, are not "consistent" with its implementation obligations.

7. *European Communities—Measures Affecting Meat and Meat Products*

On August 18, 1997, a panel convened at the request of the United States and Canada found that the EC's ban on imports of meat and meat products from cattle treated with one or more of six growth-promotion hormones was inconsistent with articles 3.1, 5.1 and 5.5 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.[129] The EC appealed the panel decisions. On January 16, 1998, the Appellate Body issued its decisions by affirming the result, but

129. *See EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by Canada—Report of the Panel*, WT/DS48/R/CAN (Aug. 18, 1997), *at* WTO Website, *supra* note 33; *EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by the United States—Report of the Panel*, WT/DS26/R/USA (Aug. 18, 1997), *at* WTO Website, *supra* note 33.

overturning some aspects of the panel's reasoning.[130] The DSB adopted the Appellate Body decision on February 13, 1998.

Notably, both the EC and the United States interpreted the Appellate Body's decision as a victory. The EC claimed that the decision allows it one year to identify appropriate evidence of the risk of hormone-treated beef.[131] Accordingly, EC officials have stated that the ban will remain in place for the fifteen-month period, while additional scientific studies are completed that would enable them to comply with the requirements of the SPS Agreement.[132]

The United States interprets the ruling to require immediate termination of the ban, stating that "[a]nything short of a clear commitment to remove an unjustified ban threatens our mutually shared interest in maintaining an effective rules-based trading system."[133] The U.S. position is that the SPS Agreement does not permit the EC to have another bite at the apple to develop scientific evidence to support its ban.

The EU proposed an implementation timetable of thirty-nine months, while the United States and Canada insisted upon ten months.[134] Unable to agree on the timetable, the parties submitted the matter to binding arbitration on April 8, 1998; the arbitrator, Julio Lacarte Muró, held that the reasonable period of time in this case was fifteen months.[135] On this occasion, the arbitrator clarified that "the party seeking to prove that there are 'particular circumstances' justifying a shorter or a longer time has the burden of proof under article 21.3(c)."[136]

As of August 1998, the EU remained insistent that it would conduct a new risk assessment and that it could rely on that new assessment, if appropriate, to continue its ban.[137] However, the EU indicated that if the new risk assessment was not completed by the arbitrator's deadline for compliance—May 13, 1998—it would re-evaluate its options for amending the ban.[138]

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130. *See EC Measures Concerning Meat and Meat Products (Hormones)—AB-1997-4—Report of the Appellate Panel,* WT/DS26/AB/R (Jan. 16, 1998), *at* WTO Website, *supra* note 33.

131. *See EC Welcomes WTO Decision to Allow Ban on Hormones*, CHEMICAL BUS. NEWSBASE, Feb. 10, 1998.

132. *See EU Loses Hormones Case*, FIN. TIMES, Feb. 14, 1998; *see WTO's Beef Rulings Give Europeans Food For Thought,* FIN. TIMES, Feb. 13, 1998. Some estimates are that the type of risk assessment to which EU officials refer could take years to complete. *See EU Hit for Politics in Food Safety; Import Rules at Core of U.S. Complaint*, CHI. SUN-TIMES, Jan. 26, 1998.

133. *WTO Backs U.S. in Hormone Treated Beef,* AAP NEWSFEED, Jan. 17, 1998. *See also* Tani Freedman, *U.S., EU Claim Victory Over Hormone-Treated Beef Verdict*, AAP NEWSFEED, Jan. 17, 1998.

134. *See* Julio Lacarte Muró, *EC Measures Concerning Meat and Meat Products (Hormones), Arbitration under article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS26/15, WT/DS48/13 para. 26 (May 26, 1998) [hereinafter Arbitrator's Decision *EC Beef Hormones*], *at* WTO Website, *supra*, note 33.

135. *Id.* para. 48.

136. *Id.* para. 27.

137. *EU Conducting New Risk Assessment on Dangers of Hormone Beef,* INSIDE U.S. TRADE, July 10, 1998.

138. *Id.*

The issues and disagreements shaping up between the United States and Canada and EC over implementation of the *EC—Beef Hormones* decision raise even more clearly than the *EC—Bananas* case three key questions. The first is the extent to which "implementation" will be effective in more complicated cases in which there is substantial disagreement over the proper interpretation of the panel and/or Appellate Body decisions.

The second question is under what, if any, circumstances a WTO Member should be allowed to use the fifteen-month "implementation" period to develop a substitute measure, while maintaining an existing WTO-inconsistent measure. In this regard, a key question is whether, at the end of the fifteen-month period, the ninety-day procedure provided for at article 21.5 of the DSU will be adequate for a panel to review and assess the new measure. For example, in this case suppose that the EC in fact develops scientific evidence that, it claims, supports its ban. Will a panel be able to review that evidence, and the arguments presented by the parties relating to it, in three months when, in the original case, the panel was barely able to complete its work in eight to ten months? At best, the answer is unclear.

The prospect of the EC's attempt to use the implementation period to rejustify its hormones ban poses the issue of whether the implementation period will become a *de facto* remand to the losing Member, in which, at the end of the implementation period, the Member's action is reviewed by the original panel for adequacy with the panel and/or Appellate Body's original decision. In our view, this would appear to be an inevitable consequence of the way the DSU addresses implementation. At the same time, if the article 21 process is to be used in this manner, losing defendants should be required to: (1) explain with particular clarity their proposed cause of action and why it is likely to result in full implementation; and (2) justify with particular specificity the need for the time requested to complete the effective "remand."

At the March 13, 1998 meeting of the DSB, the EU announced that it would "fulfill its obligations under the WTO and implement" the Appellate Body ruling; however, it stated that it would do so by carrying out a "complementary risk assessment" while maintaining in place its prohibition on imports of hormone-treated beef.[139] In response, the United States issued a strongly-worded objection stating that:

> [r]eports from Europe that the EU intends to conduct yet another risk assessment raise serious questions whether the EU intends in good faith to comply with its SPS Agreement obligations. The EU approach is based on a highly distorted reading of the WTO Appellate Body report, mistakenly relying on a single paragraph of that report, taken completely out of context. . . . For the EU now to suggest that it can develop contrary scientific evidence raises serious questions of credibility.[140]

139. *WTO Dispute Settlement Body Meeting: EU States Its Intention on Hormones*, EU Press Release No. 17/98, Mar. 13, 1998.

140. *Ambassador Barshefsky Calls for EU Compliance on WTO Hormones Decision*, USTR Press Release No. 98-27, Mar. 13, 1998.

Obviously, implementation of this decision will test the ability of the implementation provisions of the DSU to handle complicated cases in which the complaining and defending parties espouse sharply different views as to the losing party's obligations. Use of article 21.5 and application of the guideposts suggested above offer one way to enable the system to manage this and other similar disputes effectively.

8. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*

On September 5, 1997, a panel established at the request of the United States found that India's failure to establish a mechanism to preserve novelty and priority in applications for product patents for pharmaceutical and agricultural chemical inventions under its Patent Act of 1970 was inconsistent with article 70.8(a) or article 63(1) and (2) of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[141] The Panel further determined that India's failure to establish a system for granting exclusive marketing rights was inconsistent with its obligations under article 70.9 of the TRIPS.[142] India appealed the panel decision. On December 19, 1997, the Appellate Body affirmed the panel decision, and the DSB formally adopted the decision on January 16, 1998.[143]

Even before issuance and formal adoption of the Appellate Body decision, India began to review the potential consequences of the panel decision. In August 1997, Indian Prime Minister Inder Kumar Gujral established a committee to "study" the implications of the decision, which would require India to amend its Patent Act of 1970.[144] The committee of ten members included law makers

141. *See India—Patent Protection for Pharmaceutical and Agricultural Chemical Products—Report of the Panel*, WT/DS50/R at 66 (Sept. 5, 1997) [hereinafter WTO Panel Report *India—Patents*], *at* WTO Website, *supra* note 33. Indian law currently prohibits patents for any invention intended for use as a food, medicine, or drug, or relating to substances produced by chemical processes and biological inventions for treatment of humans, animals, or plants. *See id.* at 9.

142. Under article 70.8 of TRIPS, India was required to establish accepted procedures for filing of patent applications for pharmaceutical and agricultural chemical products by January 1, 1995. Article 70.8 also required India to provide exclusive marketing rights before a patent is approved. Under TRIPS, all developing countries have a ten-year grace period to implement intellectual property rights (IPRs), which extend the period of patent protection and allow for patents on products as well as processes. Under articles 70.8 and 70.9 of the agreement, however, the countries must provide two transitional measures: (1) a "mailbox" must be created for filing patent applications; and (2) "exclusive marketing rights" (EMRs) must be granted to any company that has filed a patent application and obtained marketing approval in another WTO-member state. *See id.* at 8. India's previous Congress Party government attempted to pass legislation fulfilling the TRIPS obligations, but yielded after intense opposition by the Communist Party of India (CPI), the Communist Party of India-Marxist (CPI (M)), the Bharatiya Janata Party, and the centrist Janata Dal Party. *See India Group Seeks to Address WTO Panel on Patents*, J. OF COM., Dec. 2, 1996.

143. *See India—Patent Protection for Pharmaceutical and Agricultural Products—AB-1997-5*, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter Appellate Body Report *India—Patents*], *at* WTO Website, *supra* note 33.

144. *See* N. Vasuki Rao, *India Plans Committee on Patent Law Reform*, J. OF COMM., Aug. 21, 1997. *See also WTO Tells India to Amend Its Patent Laws*, THE HINDU, Jan. 18, 1997.

opposed to compliance with the WTO, but a majority favored quick amendment to the Patent Act. As a result, several panelists resigned from the panel, arguing that the committee was biased toward compliance with the WTO and that opposition parties were not adequately represented. The panel did not issue any recommendations.[145]

Despite strong opposition from certain quarters, and while the case remained pending in the Appellate Body, India sought to identify implementation strategies that were consistent with both the TRIPS Agreement and India's own domestic policy objectives. For example, some politicians suggested that India could rely upon articles 7 and 8 of TRIPS in order to interpret the "exclusive marketing rights" requirement of the Agreement as inconsistent with the public interest.[146] On this basis, safeguards could be written into Indian law to insure that medicines and other innovations benefit the public.[147]

In December 1997, India's government collapsed. On February 13, 1998, a caretaker government, also headed by Prime Minister Gujral, announced that it would need until at least mid-June 1999, to implement the WTO decision.[148] The United States rejected this proposal at a meeting of the DSB on February 13, 1998.[149] Elections held in early March enabled the Hindu nationalist Bharatiya Janata Party (BJP) to form a government on March 19, 1998.[150] The BJP has pledged to resist pressure from the WTO, but some Indian trade experts expect that the government will implement minimum requirements, in part because Indian pharmaceutical and chemical firms have pressured the government to enact reforms.[151] At a meeting of the DSB on March 13, 1998, India announced its intention to comply with the ruling.[152] If India does not provide an acceptable plan and timetable, the United States has announced that it will submit the matter

145. *See A Ruling for Bio-piracy*, THE HINDU, Feb. 8, 1998. *See also* Praful Bidwai, *Rift in India Over Patents May Affect Other Countries*, INTER PRESS SERV., Oct. 16, 1997; *Government and Politics: The Patents Pitfall*, BUS. INDIA, Oct. 20, 1997.

146. *See* Bidwai, *supra* note 145; *see also Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex IC, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol 31; (1994), 33 I.L.M. 81 (1994) arts. 70.8, 70.9 [hereinafter TRIPS Agreement].

147. *See id.* Article 7 of TRIPS states that intellectual property rights "[s]hould contribute to the promotion of technological innovation . . . to the mutual advantage of producers and users . . . in a manner conducive to social and economic welfare. . . ." Article 8 states that Members may adopt "[m]easures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to . . . socio-economic . . . development. . . ." *Id.*

148. *See EU Loses Hormones Case*, FIN. TIMES (London), Feb. 14, 1998.

149. *See id.*

150. *See* Kenneth J. Cooper, *India's Hindu Nationalists Take Charge*, THE WASH. POST, Mar. 20, 1998.

151. *See* Miriam Jordan, *Will India Finally Yield to Patent Protection?*, INT'L HERALD TRIB., Mar. 21, 1998.

152. Timothy Reif, Telephone Interview with Dan Brinza, Legal Advisor, *USTR Delegation to the WTO*, Geneva, Switzerland (Mar. 26, 1998).

to binding arbitration.[153] India has three weeks from March 20, 1998 to announce its plan.[154]

IV. Initial Conclusions

At the outset, we offer a note of caution with respect to our analysis of the operation to date of the panel implementation process under articles 21 and 22 of the DSU. As the fourth and final stage of the dispute resolution process under the DSU, the implementation stage has begun in only eight cases, and in only two of those has the "reasonable period of time" run its full course. By contrast, to date there have been 117 requests for consultations (on eighty-two distinct matters), eleven final panel decisions, and nine Appellate Body decisions.[155] Accordingly, in the case of implementation, the empirical basis for conclusions is particularly thin.

Nonetheless, the operation to date of the implementation process does provide a basis for some initial comments and conclusions beyond those reflected in the case discussions above. First, it is clear that there are two key issues related to the efficacy of implementation: speed and completeness. Based on the cases to date, the first factor—speed—is likely to be far the easier of the two issues to resolve. That is because parties in three cases have already invoked the article 21.3(c) binding arbitration process to address the question of whether fifteen months or some other period of time for implementation is a "reasonable period" within the meaning of article 21.3. The issue was resolved either by the arbitrator's decision or by the parties in bilateral negotiations relying on the arbitrator's decision.

In short, the speed of implementation appears likely to be easier to resolve in part because it is an issue that lends itself to compromise. The more difficult questions about timeframe are whether the timeframes are too long to be of practical use either to governments or to the businesses whose commercial activities are being adversely affected. In that regard, our preliminary conclusion is that, even though faster implementation scenarios would be attractive to complainant governments and their commercial interests, for the most part the implementation schedules followed appear to be reasonable.

The most complicated question concerns whether implementation will be effective in terms of the *completeness* of the losing party's actions, from the point of the view of the winning party or parties. This issue is arising in cases such as *EC—Beef Hormones* in which, due to the relatively greater complexity of the legal or factual issues in the case, or the types of measures involved, there is more room for a losing party to "interpret" the rulings or recommenda-

153. *Id.*
154. *Id.*
155. The figure for Appellate Body decisions includes the Canadian and U.S. Beef Hormones cases as one case.

tions of a panel decision in ways that favor the continuation—in some form or to some extent—of the offending measures or the effective protection they provided.

In addition, important ancillary issues have already arisen such as whether a losing party can use the fifteen-month period to develop substitute measures of protection. These substitutes might be either direct replicas of the measure found to be WTO-inconsistent—for example, the EC's assertion that it will now develop adequate scientific evidence to support its ban on hormone-treated beef—or alternative means of accomplishing the same objective—for example, suggestions in some recent press reports that India may attempt to avoid providing patent protection under articles 63 and 70 of the TRIPS by enacting measures ostensibly justified by articles 7 and 8 of the TRIPS.

These issues present more difficult challenges for the system. They are, in our view, likely to arise in all but the most straightforward cases. And, even in relatively simple cases, there can be extensive negotiations over appropriate steps to be taken for implementation. Such negotiation occurred, for example, in the aftermath to the *Japan—Liquor* decision. In that case, which involved relatively clear issues of equalizing rates of taxation of different products, there were extensive negotiations between Japan and the three complainants in that case, particularly the United States. However, to the credit of the system, the negotiations concerned how Japan would pay for a more lengthy period of implementation for some products with concessions on others. The end-result of what Japan had to do was never seriously in question.

By contrast, as the *EC—Bananas* and *EC—Beef Hormones* cases illustrate, somewhat more complicated cases are likely to pose more difficult implementation issues. In these cases, in which the implementation process is still in a relatively early stage, it is already apparent that there are substantial disagreements among the parties as to what implementation steps are called for.

In these cases, there are basically two options for how the process can develop. In the first option, the only tool that winning complainants can use will be to seek binding arbitration over the "reasonable period of time."[156] Beyond the limited guidance that can come out of binding arbitration, the parties will, throughout the fifteen-month or so implementation period, exchange charges and countercharges and draw lines in the sand based on their respective interpretations of the panel or Appellate Body decision, after which the complainant will in all likelihood invoke articles 22.2 and 22.6 to request authorization to retaliate on the grounds that the losing defendant has not implemented the report.

156. In article XXIII:1(b) "non-violation" nullification or impairment cases, article 26.1 of the DSU provides that the binding arbitration process may also include, at the request of either party, "a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment." However, these elements are clearly restricted to non-violation context.

The result under Option 1 is not optimal. The situation would have escalated to near-confrontation and fifteen months would have passed with little or no satisfactory action having been taken. At that point, one or the other party could invoke article 21.5 to revive the original panel to resolve the disagreement; however, the circumstances for an article 21.5 process at such a late stage are far from optimal. The original panelists may be unavailable to reinterpret their complex decision based on a complex record of factual and legal issues. Moreover, if the panel then advises the losing party to take steps that it had resisted taking, the panel will either have to direct it to do so immediately or the winning complainants will have to wait a further period of time, claiming that their article 22.6 rights to seek retaliation have been impaired.

This process is not dissimilar to what the United States faced in the wake of its 1990 victory against the EC on subsidies to oilseeds.[157] The United States reconvened the panel a year later to review the EC's non-implementation and the panel provided more specific direction to the EC to bring itself into conformity.[158]

The alternative is for winning complainants to put the article 21.5 process to work early—for example, starting three to six months after adoption of the panel or Appellate Body decision—to monitor the losing country's implementation. If article 21.5 is used early and effectively, it can serve as a discipline on the temptation for losing defendants to attempt to string out implementation for as long a period of time as possible, to obfuscate, and to preserve maximum latitude.

157. *See* GATT Dispute Panel Report on European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991); GATT Dispute Panel Follow-Up Report on European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Mar. 31, 1992, GATT B.I.S.D. (39th Supp.) at 9 (1993).

158. *See id.*